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CiCi CUNNINGHAM, ESQ.  
 Nevada Bar No.: 4960  
 JAMES A. KOHL, ESQ.  
 Nevada Bar No.: 5692  
 CHRISTINE A. ROBERTS, ESQ.  
 Nevada Bar No.: 6472  
 RAWLINGS, OLSON, CANNON,  
 GORMLEY & DESRUISSEAU  
 9950 West Cheyenne Avenue  
 Las Vegas, NV 89129  
 Phone: (702) 384-4012  
 Fax: (702) 383-0701  
 Email: [bankruptcy@rocgd.com](mailto:bankruptcy@rocgd.com)  
 Attorneys for Creditors,  
 Prospect High Income Fund,  
 ML CBO IV (Cayman) Ltd.,  
 PAMCO Cayman, Ltd.,  
 PAM Capital Funding, L.P.,  
 Highland Crusader Fund, Ltd.,  
 and PCMG Trading Partners XXII, L.P.

**UNITED STATES BANKRUPTCY COURT**  
**DISTRICT OF NEVADA**

|                                  |   |                             |
|----------------------------------|---|-----------------------------|
| In re:                           | ) | CASE NO.: BK-S-06-10725-LBR |
| USA COMMERCIAL MORTGAGE COMPANY, | ) | CASE NO.: BK-S-06-10726-LBR |
| Debtor.                          | ) | CASE NO.: BK-S-06-10727-LBR |
|                                  | ) | CASE NO.: BK-S-06-10728-LBR |
|                                  | ) | CASE NO.: BK-S-06-10729-LBR |

|                                   |   |            |
|-----------------------------------|---|------------|
| In re:                            | ) | Chapter 11 |
| USA CAPITAL REALTY ADVISORS, LLC, | ) |            |
| Debtor.                           | ) |            |

|                                    |   |                            |
|------------------------------------|---|----------------------------|
| In re:                             | ) | Jointly Administered Under |
| USA CAPITAL DIVERSIFIED TRUST DEED | ) | Case No. BK-S-6-10725-LBR  |
| FUND, LLC,                         | ) |                            |
| Debtor.                            | ) |                            |

|   |   |  |
|---|---|--|
| In re:                                  | ) |  |
| USA CAPITAL FIRST TRUST DEED FUND, LLC, | ) |  |
| Debtor.                                 | ) |  |

|                      |   |  |
|----------------------|---|--|
| In re:               | ) |  |
| USA SECURITIES, LLC, | ) |  |
| Debtor.              | ) |  |

|  |   |  |
|--|---|--|
| Affects:   | ) |  |
| <input type="checkbox"/> All Debtors   | ) |  |
| <input checked="" type="checkbox"/> USA Commercial Mortgage Company              | ) |  |
| <input type="checkbox"/> USA Capital Realty Advisors, LLC                        | ) |  |
| <input checked="" type="checkbox"/> USA Capital Diversified Trust Deed Fund, LLC | ) |  |
| <input checked="" type="checkbox"/> USA Capital First Trust Deed Fund, LLC       | ) |  |
| <input type="checkbox"/> USA Securities, LLC,                                    | ) |  |

**HEARING:****Date: August 4, 2006****Time: 1:30 p.m.**

**OPPOSITION TO DEBTOR'S MOTION TO DISTRIBUTE FUNDS AND TO  
GRANT ORDINARY-COURSE RELEASES AND DISTRIBUTE PROCEEDS  
(AFFECTS USA COMMERCIAL MORTGAGE, USA CAPITAL DIVERSIFIED  
TRUST DEED FUND, AND USA CAPITAL FIRST TRUST DEED FUND)**

COMES NOW, CiCi Cunningham, Esq. on behalf of Creditors, Prospect High Income Fund, ML CBO IV (Cayman) Ltd., PAMCO Cayman, Ltd., PAM Capital Funding, L.P., Highland Crusader Fund, Ltd., and PCMG Trading Partners XXII, L.P., (hereinafter "Highland Capital") and opposes the Debtor's Motion to Distribute Funds and to Grant Ordinary-course Releases and Distribute Proceeds (Affects USA Commercial Mortgage, USA Capital Diversified Trust Deed Fund, and USA Capital First Trust Deed Fund. This Opposition is based upon the entire case file, the points and authorities contained herein, and any oral argument that this Court may entertain.

**POINTS AND AUTHORITIES**

**I. STATEMENT OF FACTS**

**A. State Court**

1. On or about July 12, 2002, Highland Capital filed a tortious interference complaint in the Eighth Judicial District Court, Clark County, Nevada (Case Number 02-A-453232) against Debtor USA Capital Diversified Trust Deed Fund, LLC (hereinafter "Diversified")

**B. Bankruptcy Court**

2. On or about April 13, 2006, the above-referenced Debtors filed voluntary bankruptcy petitions under Chapter 11, Title 11 of the United States Code and an order for relief was entered.

3. On or about May 9, 2006, the Court entered an order jointly administering the above-referenced Debtors.

4. On or about May 26, 2006, Highland Capital filed proof of claim in the amount of Twenty Million Dollars (\$20,000,000.00) in the Diversified case. The Proof of Claim is in regards to the above-referenced state court litigation. (See copy of Proof of Claim attached hereto and incorporated herein by reference as Exhibit "A".)

5. On or about July 7, 2006, the Debtors filed a Motion to Distribute Funds.

6. In the Motion to Distribute Funds, the Debtor is seeking to distribute funds directly to investors in Diversified and bypass the unsecured creditors.

### C. Disbursement is Premature

7. There are at least two other lawsuits against Diversified listed on the Statement of Financial Affairs for additional claims in excess of Twenty Million Dollars (\$20,000,000.00). (See copy of Statement of Financial Affairs, Question 4a Attachment, regarding lawsuits attached hereto and incorporated herein by reference as Exhibit "B".) These lawsuits include:

a. Weddell, et al v USA Commercial Mortgage Company, USA Capital Diversified Trust Deed Fund LLC, et al (Case No. 2:01-cv-0355 in U.S. District Court); and

b. Amblano, LLC et al v Peek, et al. (Case Number 02-A-458515 in Eighth Judicial District Court, Clark County, Nevada).

8. The Debtor's estimate of unsecured debt did not include Highland Capital's Twenty Million Dollars (\$20,000,000.00) Proof of Claim.

9. Further, additional claims may exist but are unfiled. At the 341(a), it was repeatedly stated that **there is no current bar date for Proof of Claims.**

10. Highland Capital is concerned about this distribution leaving the Estate unable to pay the unsecured creditors in full.

11. The Debtor makes no specific breakdown as to dollar amount of funds going to the specific classes of investors.

12. Nor does the Debtor state how much reserve will be maintained.

13. At no time does the Debtor, demonstrate that this reserve will be sufficient to pay the unsecured claims in full.

## II. LEGAL ARGUMENT

### A. Highland Capital Seeks Clarification of the Decision Not to Distribute to Diversified

In light of the Supplement to the Motion to Distribute, much of this Opposition may be moot. Highland Capital is requesting clarification of the decision not to distribute to Diversified. The Debtor asserts that the Fund has "negative balance". Does the Debtor mean the members of the Fund have already been over paid and will not receive an additional

1 distribution **to the Fund** at this time? **Or** is the Fund receiving a distribution, but due to the  
 2 existing debts such as Proof of Claims, there is insufficient funds to make a premature  
 3 distribution **directly to members**?

4 **B. There is not Enough Information to Make an Informed Decision**

5 Highland Capital further objects because insufficient information has been disclosed.  
 6 While Highland Capital certainly understands the need for the Debtors to be cautious and  
 7 discrete with the Investors' personal information; Highland Capital believes that it self and all  
 8 other parties to this case need additional disclosures. Highland Capital asserts that it and other  
 9 creditors need sufficient information to make an informed decision.

10 **C. Opposition to Distribution Directly to Fund Members**

11 Highland Capital is an unsecured creditor of Diversified with an unsecured claim amount  
 12 of Twenty Million Dollars (\$20,000,000.00). Highland Capital objects to the Motion for  
 13 Distribution based on the following reasons: It is too early to distribute as the unsecured claims  
 14 have not been determined. There is no bar date, no plan, and the Debtor does not have enough  
 15 information to determine the total amount of the claims. Further, the Debtor's estimate of  
 16 unsecured claims is incorrect in that the Debtors estimate there is approximately Eight Hundred  
 17 Eighty-Five Thousand Dollars (\$885,000,00) in unsecured debt. Whereas the unsecured debt  
 18 totals (prior to the bar date) Twenty Million, Two Hundred Thousand Dollars (\$20,200,000.00).  
 19 In addition, an early distribution directly to the investors violates the "absolute priority rule".  
 20 Finally, there is no guarantee that there will be sufficient funds to pay all creditors and once the  
 21 funds have been distributed, there is little or no likelihood of retrieval.

22 **1. Distribution is Premature Because Unsecured Claims are Not Determined**

23 Highland Capital asserts that it is too premature to distribute funds directly to the  
 24 investors, as the Debtor does not know what the unsecured claims are. Furthermore, the Debtor  
 25 does not have enough information yet to determine these claims. As stated previously, there is  
 26 no bar date set and so additional claims can continue to be filed even after the proposed  
 27 distribution would be made. Further, the Debtor has omitted three creditors on its Schedule F,  
 28 which are listed on the Statement of Financial Affairs. Those creditors are: (1) Highland Capital

1 with a Proof of Claim of Twenty Million Dollars (\$20,000,000.00) (2) RP Weddell et al with an  
 2 unknown claim value. (3) Amblano LLC, et al also with a currently unknown claim value. These  
 3 three claims in excess of Twenty Million Dollars (\$20,000,000.00) by far exceed the original  
 4 Eight Hundred Eighty-Five Thousand Dollars (\$885,000,00) projected by the Debtor. While the  
 5 Debtor claims that it will establish a reserve for the unsecured claims, the motion filed by the  
 6 Debtor does not indicate that the Debtor has taken into account these claims and that the reserve  
 7 will encompass these claims.

8 In addition, Highland Capital asserts that this distribution is premature in that the Debtor  
 9 has filed no plan or even confirmed a plan. The Debtor does not even specify the nature of the  
 10 distribution and to whom the funds will be distributed, how much will be distributed and how  
 11 much will be on reserve. It is Highland Capital's position that the Debtor cannot specify this  
 12 because at this time the Debtor does not know.

## 13 **2. The Debtor's Estimation of Claims is Wrong**

14 As stated *Supra*, the Debtor estimates Eight Hundred Eighty-Five Thousand Dollars  
 15 (\$885,000,00) in unsecured claims but in reality at this date, the claims total Twenty Million,  
 16 Two Hundred Thousand Dollars (\$20,200,000.00). The Debtor has incomplete information and  
 17 cannot have complete information until after the bar date has passed. Until all of this information  
 18 is determined, it is too premature to distribute these funds.

## 19 **3. The Debtor does Not Have Authority for this Distribution**

### 20 **a. The Distribution of Funds Violates the "Absolute Priority Rule"**

21 The Debtor is seeking to jump over the unsecured creditors to pay the investors. This is a  
 22 violation of the "absolute priority rule". The pre-confirmation payment violates 11 U.S.C §1123  
 23 and Bankruptcy Rule 3021. Creditors cannot be paid out of priority pursuant to 11 U.S.C §§502,  
 24 503, 506, and 507.

25 The Debtor attempts to circumvent priority by asserting that there are "extraordinary  
 26 circumstances" i.e. sufficient funds to pay all of the claims. The Debtor cannot establish  
 27 extraordinary circumstances, because the Debtor does not have all of the requisite information.

28 ///

**b. Extraordinary Circumstances Do Not Exist**

As stated *Supra*, Highland Capital asserts that there are not extraordinary circumstances because the Debtor has no real estimate of claims, whether there is sufficient surplus to justify early distribution.

The Debtor has not established what actual cash is attributed to Diversified. As depicted in the schedules, many of the accounts receivables are actually owed by insiders or may be bad debt. In addition, Mr. Allison testified at both 341(a)s that Diversified is the Fund has the most non-performing loans. Highland Capital suggests that much detailed analysis needs to be done either before the Debtor can make an informed decisions or even the creditors can make an informed decision.

**c. The Cases Cited By the Debtor are Distinguishable**

Highland Capital asserts that the Debtor has not established extraordinary circumstances to give to rise to an early distribution. To support their assertion that a Court does have power to order distribution prior to the plan, the Debtor cites *In re Realty Associates Sec Corp.*, 58 F. Supp. 220 (E.D.N.Y. 1944), and *In re Industrial Office Bldg. Corp.*, 171 F.2d 890 (3rd Cir. 1949). They are distinguishable as they are not primary authority and they are not from the 9<sup>th</sup> Circuit and are from 1944 and 1949, prior to the Code. In addition, the extraordinary circumstances were such in these cases that the debtors had an indisputable surplus to pay bond holders. This is distinguishable to the case at bar, which there is not even a bar date, and we do not know that there will be surplus funds. The Debtor's failure to include Highland Capital's Twenty Million Dollar (\$20,000,000.00) claim, indicates that there may be other potential large claims of which the Debtor is not aware. At this point, there are at least two other lawsuits, which may have significant value.

Debtors admit in their brief that *Realty Associates* and *Industrial Office* precede the enactment of the code, but have never been overturned and instead has been cited with approval by later Courts. *In re Westpointe Stevens, Inc.*, 333 B.R. 30 (S.D. N.Y. 2005) is referenced as a negative history for *Realty Associates*. While *Westpointe* does not directly overturn *Realty Associates* it does rule that pre-confirmation distributions could not be made to junior lienholders



1 above senior lienholders. The Court found that *Realty Associates* was different because in that  
 2 case the pre-confirmation distributions were not made “in derogation of affected creditors  
 3 interests.” *Westpointe* at 52.

4 Debtors also state that other Courts have cited *Realty Associates* and *Industrial Office*  
 5 with favor and cite *In re Conroe Forge & Mfg Corporation* 82 B.R. 781, 784 (Bankr. W.D. Pa.  
 6 1988), and *In re San Jacinto Glass Industrial Inc.*, 93 B.R. 934 (Bankr. S.D. Texas 1988). Those  
 7 cases are not 9<sup>th</sup> Circuit and those cases were dealing with distribution from a §363 sale, whereby  
 8 the Debtors were liquidating assets. In *Conroe* the Court ruled that distribution **could not be**  
 9 **made prior to plan confirmation**. In reaching its decision the Court relied on *In re Braniff*  
 10 *Airways Inc.*, 700 F.2d 935 (5<sup>th</sup> Cir. 1987). *Braniff* stated that Chapter 11 confirmation  
 11 requirements “should not be short-circuited, and, second, approval of pre-plan distributors in  
 12 liquidating Chapter 11 cases would leave very little incentive for completing the requirement for  
 13 disclosure...and plan by way of reorganization or liquidation.” *Conroe* at 784 citing *Braniff* at  
 14 940.

15 Debtor’s cite *In re Air Beds Inc.*, 92 B.R. 419 (9<sup>th</sup> Cir. 1988) recognizing that pre-  
 16 confirmation distributions generally were not appropriate but could be made in extraordinary  
 17 circumstances. However, *Air Bed* ruled that the Court **was not allowed to make the pre-**  
 18 **confirmation distributions** and again the case dealt with a §363 sale and therefore, it is  
 19 distinguishable. The 9<sup>th</sup> Circuit also made it clear in that case that it took into consideration that  
 20 while a plan had not been confirmed, a Plan had been proposed and *filed* with the Court. *Air Beds*  
 21 at 423 FNI. In *Air Beds* the Court overturned the bankruptcy Court’s decision to allow payment  
 22 from the proceeds of a §363 sale to the IRS over an administration claim without determining  
 23 whether the IRS claim was secured, priority or unsecured. In *Air Beds*, Debtors had filed a plan  
 24 of liquidation. The Court stated that “...if distribution is made to creditors in a liquidating  
 25 Chapter 11 before confirmation of a plan there will be little incentive for parties in interest to  
 26 prosecute the case in an expeditious manner, much less to perform the work required to issue and  
 27 obtain approval of a disclosure statement.” *Air Beds* at 423.

28 ///

1           **4. There is no Guarantee the Reserve Shall be Sufficient to Pay Claims.**

2           The Debtor asserts that it will set a reserve amount sufficient to pay all claims. However,  
3 with the claims being unknown and the Debtor clearly having incorrect information regarding its  
4 claims, Highland Capital is concerned the Debtor has insufficient information to set aside a  
5 sufficient reserve to pay claims. In addition, the Debtor claims that the money that it will set  
6 aside will also be used for administrative fees. In a case this size, the administration fees are  
7 staggering. Whatever is set aside for a reserve may also be utilized for administrative fees.

8           **5. Too Little Information Has Been Disclosed to Creditors**

9           Too little information has been disclosed to the creditors to allow the creditors to make an  
10 informed decision regarding this matter. Obviously a decision of this magnitude requires notice  
11 to all of the creditors. This is something that will be more appropriately disclosed in a disclosure  
12 statement of a Chapter 11 Plan. It is Highland Capital's position that too little information has  
13 been disclosed to the creditors and too little time to allow the creditors to make an informed  
14 decision. There are no specifics regarding payment amounts. There are no specifics regarding  
15 the reserve amounts. There are no specifics about what actual claims will be remaining.

16           WHEREFORE, Highland Capital prays that this Court deny the Motion to Distribute  
17 funds to the extent that there is not a sufficient reserve to pay Highland Capital's Twenty Million  
18 Dollars (\$20,000,000.00) claim; to the extent that Highland Capital would be bypassed without a

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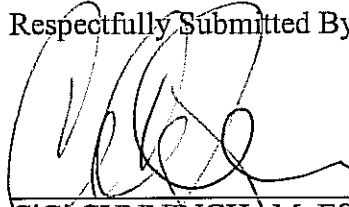
28       ///



1 sufficient reserve to cover its claim; to the extent that there is not sufficient reserve to pay all  
2 claims; and for any further relief that this Court deems just and proper in the premises.

3 DATED this \_\_\_\_ day of July, 2006.

4 Respectfully Submitted By:



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6  
7 CICI CUNNINGHAM, ESQ.  
8 Nevada Bar No.: 4960  
9 RAWLINGS, OLSON, CANNON,  
10 GORMLEY & DESRUISSEAU  
11 9950 West Cheyenne Avenue  
12 Las Vegas, NV 89129  
13 Attorneys for Creditors,  
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15 ML CBO IV (Cayman) Ltd.,  
16 PAMCO Cayman, Ltd.,  
17 PAM Capital Funding, L.P.,  
18 Highland Crusader Fund, Ltd.,  
19 and PCMG Trading Partners XXII, L.P.  
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Law Offices of  
RAWLINGS, OLSON, CANNON  
GORMLEY & DESRUISSEAU  
A Professional Corporation  
9950 West Cheyenne Avenue  
Las Vegas, Nevada 89129  
(702) 384-4012 Telecopier (702) 383-0701

# **EXHIBIT A**

## District of Nevada

## Notice of Electronic Claims Filing

The following transaction was received from CUNNINGHAM, CICI on 6/7/2006 at 1:04 PM PDT

**Case Name:** USA CAPITAL DIVERSIFIED TRUST DEED FUND, LLC  
**Case Number:** 06-10727-lbr  
PROSPECT HIGH INCOME FUND, ET AL  
**Creditor Name:** C/O CiCi CUNNINGHAM, ESQ.  
9950 WEST CHEYENNE AVENUE  
LAS VEGAS, NV 89129  
**Claim Number:** 20  
**Total Amount Claimed:** \$20000000.00

The following document(s) are associated with this transaction:

**Document description:**Main Document

**Original filename:**G:\Bankruptcy\E-Filing\USA Capital\USA Cap Div Trust-POC-27.pdf

**Electronic document Stamp:**

STAMP bkecfStamp\_ID=989277954 [Date=6/7/2006] [FileNumber=6964342-0]  
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**Document description:** Complaint

**Original filename:**G:\Bankruptcy\E-Filing\USA Capital\POC-EX1a.pdf

**Electronic document Stamp:**

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**Document description:**Exhibit 1 to Complaint

**Original filename:**G:\Bankruptcy\E-Filing\USA Capital\POC-EX1b.pdf

**Electronic document Stamp:**

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**Document description:**Exhibit 1 to Complaint

**Original filename:**G:\Bankruptcy\E-Filing\USA Capital\POC-EX1c.pdf

**Electronic document Stamp:**

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**Document description:**Exhibit 1 to Complaint

**Original filename:**G:\Bankruptcy\E-Filing\USA Capital\POC-EX1d.pdf

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11372f90480d572a2feec3faa2daa12fc1eb0cb8dc79a5b1aa1896dc953]]

**Document description:**Exhibit 1 to Complaint

**Original filename:**G:\Bankruptcy\E-Filing\USA Capital\POC-EX1e.pdf

**Electronic document Stamp:**

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**6-10727-lbr Notice will be electronically mailed to:**

KELLY J. BRINKMAN kbrinkman@gouldpatterson.com,

ANET L. CHUBB tbw@jonesvargas.com

VILLIAM D COPE cope\_guerra@yahoo.com, cope\_guerra@yahoo.com

ICI CUNNINGHAM bankruptcy@rocgd.com

AUREL E. DAVIS bklsclv@lionelsawyer.com,  
 davis@lionelsawyer.com;gbagley@lionelsawyer.com;ldavisesq@aol.com

HOMAS H. FELL BANKRUPTCYNOTICES@GORDONSILVER.COM

CHRISTOPHER D JAIME cjaime@waltherkey.com, kbernhar@waltherkey.com

ROBERT R. KINAS rkinas@swlaw.com,  
 strand@swlaw.com;jlustig@swlaw.com;lholding@swlaw.com;imccord@swlaw.com

VILLIAM L. MCGIMSEY lawoffices601@lvcoxmail.com,

ANETTE E. MCPHERSON bkfilings@s-mlaw.com

ENARD E. SCHWARTZER bkfilings@s-mlaw.com

U.S. TRUSTEE - LV - 11 USTPRegion17.lv.ecf@usdoj.gov,

MATTHEW C. ZIRZOW bankruptcynotices@gordonsilver.com

**6-10727-lbr Notice will not be electronically mailed to:**

ANNETTE W JARVIS  
 BOX 45385  
 6 SOUTH STATE STREET, #1400  
 ALT LAKE CITY, UT 84145-0385

AY QUINNEY & NEBEKER P.C.  
 6 SOUTH STATE STREET, SUITE 1400  
 O. BOX 45385  
 ALT LAKE CITY, UT 84145

SCHWARTZER & MCPHERSON LAW FIRM  
 850 S. JONES BLVD., #1  
 LAS VEGAS, NV 89146

BRADLEY J STEVENS  
 300 N CENTRAL AVE  
 HOENIX, AZ 85012

**CASE NO.: BK-S-06-10725-LBR (Lead Case)**

☐ Check Box if you have never received any notices from the Bankruptcy Court in this case.

Penalty for presenting fraudulent claim: Fine of up to \$500,000 or imprisonment for up to 5 years, or both, 18 U.S.C. §§ 152 and 3571.

**THE EXHIBIT TO THE  
PROOF OF CLAIM HAS  
NOT BEEN ATTACHED  
DUE TO ITS  
VOLUMINOUS NATURE.  
ANYONE REQUIRING A  
COPY OF THE EXHIBIT  
PLEASE CONTACT THE  
OFFICE OF CiCi  
CUNNINGHAM, ESQ. AT  
(702) 384-4012.**

**EXHIBIT B**



## Statement of Financial Affairs

## Question 4. a. Attachment

## SUITS AND ADMINISTRATIVE PROCEEDINGS

4. a. All suits and administrative proceedings to which the debtor is or was a party within one year immediately preceding the filing of this case.

| CAPTION OF SUIT  | CASE NUMBER  | NATURE OF PROCEEDING   | COURT OR AGENCY<br>AND LOCATION                                 | STATUS OR<br>DISPOSITION |
|--|--------------|--|---|--------------------------|
| Prospect High Income Fund v. USA Capital Diversified Trust Deed Fund, LLC, et al.                        | 02-A-453232  | Tortious Interference  | Eighth Judicial District Court - Clark County - State of Nevada | Open                     |
| Weddell, et al. v. USA Commercial Mortgage Company, USA Capital Diversified Trust Deed Fund, LLC, et al. | 2:01-cv-0355 | Breach of contract   | U.S. District Court - Nevada                                    | Open                     |
| Amblamo, LLC, et al. v. Peek, et al.   | 02-A-458515  | Abuse of Process (USA Capital Diversified Trust Deed Fund, LLC is a plaintiff) | Eighth Judicial District Court - Clark County - State of Nevada | Open                     |